

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 10 February 2004**

**CASE NO.: 2003-LHC-945**

**OWCP NO.: 1-153940**

In the Matter of

**THOMAS E. BATES**

Claimant

v.

**ATKINSON CONSTRUCTION COMPANY**

Employer

and

**THE TRAVELERS INSURANCE COMPANY**

Carrier

Appearances:

James W. Case, Esquire, Topsham, Maine for the Claimant

Richard F. VanAntwerp, Esquire (Robinson Kriger & McCallum), Portland,  
Maine for the Employer and Carrier

Before: Colleen A. Geraghty  
Administrative Law Judge

**DECISION AND ORDER**

**I. Statement of the Case**

This proceeding arises from a claim for workers' compensation benefits filed by Thomas E. Bates, a longshoreman, against Atkinson Construction Company ("Atkinson") under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq. (the "Act"). After an informal conference before the District Director of the

Department of Labor's Office of Workers' Compensation Programs ("OWCP"), the matter was referred to the Office of Administrative Law Judges ("OALJ") for a formal hearing. A hearing was conducted before me in Portland, Maine on September 18, 2003, at which time all parties were afforded the opportunity to present evidence and oral argument. The Claimant appeared at the hearing represented by counsel, and an appearance was made by counsel on behalf of the Employer and its insurance carrier, The Travelers Insurance Company. The parties offered stipulations, and testimony was heard from the Claimant. Documentary evidence was admitted without objection as Administrative Law Judge Exhibits ("ALJX") 1-3, Claimant's Exhibits ("CX") 1-12, and Employer's Exhibits ("EX") 2. TR 9-10. The Claimant objected to the admission of Employer's Exhibit 1, investigative reports from a private investigator on the ground that the report contained characterizations of the activity reported. TR 11-12. The Employer responded that the Court could distinguish between appropriate and inappropriate observations by the investigator. I will make my own judgments as to the nature of the activity recorded. The Claimant's objection is overruled and Employer's Exhibit, EX 1, is admitted. The Claimant submitted an additional exhibit, a report by Dr. John Hall, marked CX 13 with his brief and represented that the parties had reached agreement on the submission of the exhibit. Therefore, Claimant's post-hearing exhibit, CX 13, is admitted. Thereafter, the parties filed briefs and the record is now closed.

After careful analysis of the evidence contained in the record, the parties' stipulations and their post-hearing briefs, I have concluded that the claimant suffered a compensable injury to his back which arose out of his employment with Atkinson Construction at the Bath Iron Works facility and that he is, therefore, entitled to an award of temporary total and temporary partial disability compensation with interest on unpaid compensation, medical benefits and attorney fees. My findings of fact and conclusions of law are set forth below.

## **II. Findings of Fact and Conclusions of Law**

### **A. Background**

The Claimant is a forty-year old individual who completed high school and one-year of college in a business management program. TR 17. He has been employed as a factory worker, sales clerk, auto mechanic and is assisting his father in a video rental business. TR 18. The Claimant began working as a carpenter in 1986. TR 18. He worked primarily as a self-employed carpenter on residential projects from 1986 until 2000. Sometime in 1999 he became a member of the Carpenters Union and he became eligible for jobs hired out of the Union Hiring Hall. TR 63-65. The Claimant began working at Atkinson Construction at the end of July 2000, a job he obtained out of the hiring hall. TR 26, 27. At the time Atkinson Construction was constructing a concrete dry dock and launch for Bath Iron Works. The Claimant described his responsibilities to include pile driving, pouring cement footings into the Kennebec River, using a torque wrench weighing 45-50 pounds to tighten bolts to hold the steel forms and using hydraulic jacks to install pins in steel tubing. TR 19-25.

The Claimant testified that on July 18, 2001 near the end of the work shift he was maneuvering a manhole cover weighing approximately 200-230 pounds, when he felt a tearing in his lower back. TR 28. The Claimant testified that he was experiencing extreme pain in his back

running down his left leg. TR 29-30. The Claimant testified that the next day he was unable to bend over and needed assistance getting into his car to drive back to work to see the medical personnel. The Atkinson Construction safety man took the claimant to the urgent care facility at the hospital in Bath, Maine. TR 32. The doctor initially prescribed 800 mg of ibuprofen, and told the Claimant to rest for three days and return if his condition had not improved. The pain continued over the weekend and the Claimant went to the hospital emergency room. He was given vicoden for pain and told to seek medical care for his back. TR 32-33. The Claimant was referred to Dr. Peter Mason of Occupational Health Associates. He treated with Dr. Mason who recommended rest and physical therapy. In September 2001, Dr. Mason released the Claimant to return to work. CX 11 at 76.

The Claimant did not return to work at Atkinson Construction, but was assigned from the Union Hiring Hall to a remodeling job with CCB at Pineland. TR 71-72. The Claimant testified that he was doing window framing and installing blocking between steel studs. TR 38-39. This job lasted three and one-half weeks until a general lay-off occurred. TR 38-41, 72. The Claimant collected unemployment for several months and in April 2002 he worked as a carpenter for his brother-in-law for a four week period. The Claimant next obtained a job out of the hiring hall installing vinyl siding at the Naval Air Station in New Brunswick. TR 42. The Naval Air Station job, rehabilitating base housing, began some time between the end of April 2002 and mid-May. TR 49-50, 74. By early June the Claimant testified he was experiencing increasing back pain and discomfort, and consulted his physician, Dr. Kamlesh Bajpai, on June 3, 2002. CX 1. Dr. Bajpai referred him for neurological consultation and ordered an MRI. TR 74; CX 2 at 8. The MRI was performed at Maine Medical Center on June 20, 2002. Dr. Bajpai told the Claimant he should not be working and the Claimant did not return to his job at the Naval Air Station after June 23, 2002. TR 48. The Claimant saw Dr. Omsberg, a neurosurgeon, on July 11, 2002. CX 6. Dr. Omsberg read the Claimant's MRI scan to indicate the "tail of a herniated disc compressing the L5 nerve root on the left." CX 6 at 25; CX 2. Dr. Omsberg recommended surgery and prepared a report concluding that the Claimant did not have a work capacity at that time. CX 6 at 26.

The Claimant sought a second opinion from Neurosurgical and Spine Associates of Maine on August 27, 2002. CX 4. The Claimant was seen by Jane Folgert, a physician's assistant, who advised the Claimant that surgery would not be appropriate and recommended conservative treatment including pain medication and epidural steroid injections. The Claimant currently treats with Dr. John Hall. CX 11 at 81-83; CX 13. Since March 2003 the Claimant has continued to perform residential carpentry work in a self-employed capacity, working approximately 30 hours per week. TR 48.

#### B. Parties' Stipulations and Issues Presented

The parties have stipulated that: (1) The Act applies to the claim for a back injury occurring on July 18, 2001;(2) the injury arose out of and in the course of employment; (3) an employer/employee relationship existed between the Claimant and Atkinson; (4) the notice, claim and controversion of the claim were timely; (5) the informal conference was held on December 12, 2002; (6) the average weekly wage is \$933.63;<sup>1</sup> (7) compensation has been paid

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<sup>1</sup> Post-hearing the parties stipulated to an average weekly wage of \$933.63. Claimant Br. at 2, Employer Br. at 1.

for the period of July 20, 2001 to September 12, 2001 at the weekly rate of \$545.95; (8) the claimant has not returned to industrial construction but has engaged in alternate employment as a self-employed carpenter. TR 5-7.

Regarding the issues presented, the remaining issues include continuing causation and the nature and extent of disability. Claimant Br. 2, Employer Br. 1.

### C. Causation

Section 20(a) of the Act provides the Claimant with a presumption that his condition is causally related to his employment if he shows that he suffered harm and that employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. *See Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13 (CRT)(2d Cir. 1989); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Once this prima facie case is established, the Claimant has invoked the presumption, and the burden of proof shifts to the employer to rebut it with substantial countervailing evidence. *Merrill*, 25 BRBS at 144. If the presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *See Del Vecchio v. Bowers*, 196 U.S. 280 (1935).

The parties stipulated that the Claimant suffered a work injury to his back on July 18, 2001 when he lifted a heavy manhole cover. TR 5-7. The Employer paid temporary total disability compensation benefits from the date of injury through September 12, 2001, the date the Claimant was released by Dr. Mason to return to work without restrictions. Cl. Br. at 3; Em. Br at 2; CX 11. At hearing, the Employer raised the issue of continuing causation or, stated differently, whether the Claimant's incapacity subsequent to September 12, 2001 is related to his July 2001 back injury. TR 8, 16. However, the Employer did not address this issue in its brief. Therefore, the Employer is deemed to have waived this issue.

In any event, although Dr. Mason, who initially treated the Claimant's back injury, cleared the Claimant to return to work after some initial improvement in September 2001, his diagnosis at that time was "right radicular pain, stable and improved." CX 11 at 76. Dr. Mason did not order an MRI of the Claimant's spine, and the Claimant did not return to Dr. Mason after he was released. The Claimant returned to construction work in October 2001 at CCB on a remodeling project. TR 38-39, 42, 49, 72. The Claimant testified that the work was less strenuous than his job at Atkinson Construction. Nevertheless, the Claimant testified that his back condition never fully resolved and he continued to experience back and left leg pain which increased with more strenuous activity. TR 35-37. The Claimant saw Dr. Bajpai in June 2002 for his increasing back pain and was referred to Dr. Eric Omsberg, a neurosurgeon, in July 2002. According to Dr. Eric Omsberg, the MRI performed on June 20, 2002 disclosed a herniated disc "compressing the L5 nerve on the left." CX 6 at 25. Dr. Omsberg recommended surgery and stated that the Claimant did not have a work capacity. CX 6 at 26. The Claimant sought a second opinion from Neurosurgical and Spine Associates of Maine on August 27, 2002. He was seen by Jane Folgert, a physician's assistant, who advised that surgery would not be appropriate and recommended conservative treatment. CX 4 at 14-15. The Claimant was treated with anti-

inflammatory medication. The Claimant has not had surgery and he testified that he continues to experience pain in his back and left leg, especially after strenuous or prolonged activity.<sup>2</sup> The Claimant now treats with Dr. John Hall for his back condition. He last saw Dr. Hall on September 17, 2003 and he continues to take Ultracet, as needed, for pain. CX 13. In September 2003, Dr. Hall imposed limitations on pushing/crawling, lifting and carrying in excess of 10 pounds, working overhead, use of vibratory tools and twisting and bending. CX 11 at 82A.

The evidence establishes that the Claimant injured his back working for Atkinson Construction at the Bath Iron Works facility. Although he was released back to work by Dr. Mason based upon an x-ray report and some improvement after a three month period of rest and treatment, the Claimant stated he continued to have pain. Dr. Mason was not aware of the subsequent MRI revealing a herniated disc pressing on a nerve. The objective MRI results support the Claimant's subjective complaints of pain in his low back and left leg, especially with strenuous activity. Both Drs. Omsberg and Hall have placed restrictions limiting the Claimant's activities. On balance, I find that the Claimant's current limitations are causally connected to the back injury he suffered on July 18, 2001 while working for Atkinson at the Bath Iron Works facility.

#### D. Nature and Extent of Disability

The Claimant seeks temporary total compensation benefits pursuant to Section 8(b) of the Act for periods of time after September 12, 2001 during which he was not working. The Claimant also seeks temporary partial compensation benefits pursuant to section 8(e) of the Act for periods after September 12, 2001 in which he was working but earning reduced wages. The Claimant has worked as a carpenter in the construction field for various periods since September 12, 2001.

In order to establish total disability, a Claimant must show that he cannot return to his regular or usual employment due to the work-related injury. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989). The parties disagree as to the nature of the Claimant's "usual employment." The Claimant contends that his usual employment was as a carpenter in industrial construction, the work he was performing on the date of injury. Cl. Br. at 6-7. The Claimant acknowledges that he has returned to residential construction as a carpenter, but states that his wages in residential carpentry are significantly less than the wages he earned as a carpenter at Atkinson Construction. *Id.* Conversely, the Employer argues that the Claimant's usual work was as a carpenter in residential construction, the work he engaged in from 1986 until 2000. Em. Br. at 3-4. The Employer contends that since the Claimant is currently performing residential construction and carpentry with earnings comparable to his earning in 1986-2000 he has experienced no loss of earning capacity. Em. Br. at 4.

The Benefits Review Board (Board) has held that a Claimant's "usual employment" is the Claimant's regular duties at the time of injury. *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689, 692 (1982). See also *Moore McCormack Lines Inc. v. Quigley*, 178 F. Supp. 837 (S.D.N.Y.

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<sup>2</sup> It is surprising that the Claimant apparently never saw a physician at Neurosurgical Associates and appears to have relied on the opinion and recommendation from the physician's assistant.

1959). At the time of injury on July 18, 2001, the Claimant was working for Atkinson Construction as a carpenter and pile driver. The Claimant began working for Atkinson Construction in July 2000 and worked for the company for one year prior to his injury on July 18, 2001. CX 8. The Claimant testified that his work as a carpenter and pile driver was heavy in nature. The Claimant testified that his duties required pile driving, pouring cement footings into the Kennebec River, using a torque wrench weighing 45-50 pounds to tighten bolts to hold the steel forms, using hydraulic jacks to install pins in steel tubing, and maneuvering manhole covers weighing 200 pounds or more. TR 19-22, 28.

The Employer attempts to distinguish the Board's *Ramirez* holding that a Claimant's "usual" employment is the work he was performing at the time of injury on the ground that the union construction work the Claimant was performing for Atkinson Construction at the time of injury is unavailable to the Claimant or to any other employee. Em. Br. at 3-4. The Employer states that Atkinson Construction Company completed construction of the project at Bath Iron Works in 2002 and is no longer doing any work in the State of Maine. Em. Br. at 4.<sup>3</sup> The Employer contends that the wages Claimant earned at Atkinson Construction were a temporary opportunity for the duration of the construction project. The Employer asserts that since the Claimant has resumed the type of residential construction work he performed for most of the 14 years before he began working at Atkinson Construction in 2000 and is earning the same wages he earned as a self-employed carpenter from 1986 through 2000, that he has suffered no loss of earning capacity attributable to his July 18, 2001 back injury. *Id.*

The Employer's effort to distinguish the *Ramirez* decision is unpersuasive. In *Ramirez*, the Board acknowledged that *Ramirez* had "engaged in several occupations during the course of his working life, but was employed full-time unloading fish for four months prior to injury." *14 BRBS at 693*. The Board held that on these facts it "must conclude that the Claimant's duties unloading fish constitute his usual employment for purposes of determining the extent of his disability." *Id.* In this case, the Claimant worked both as a self-employed carpenter in residential construction and on four industrial construction projects over the fourteen years before he began working for Atkinson Construction. However, the Claimant was employed full-time by Atkinson Construction as a pile driver and carpenter for one year prior to his injury.<sup>4</sup> Therefore, following the Board's *Ramirez* decision, I find that the Claimant's usual employment was as a carpenter in industrial construction and pile driver.

After his release to return to work in mid September 2001, the Claimant was assigned from the Union Hiring Hall to work at CCB. The CCB job was a remodeling job which lasted approximately three and one-half weeks. The Claimant stated when he had to bend over while wearing his tool belt his back pain increased. TR 41-42. The Claimant then worked as a self-employed carpenter for approximately four weeks in April 2002. In May 2002 the Union Hiring

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<sup>3</sup> Although the Employer makes this statement in its brief, no evidence was presented at hearing to support the assertion.

<sup>4</sup> No evidence was presented showing that absent the injury, the Claimant's employment at Atkinson Construction would not have continued. Even assuming for the sake of argument that the Atkinson Construction job would have ended at some point, absent the injury to the Claimant's back, he would have remained employed in industrial-type construction working jobs out of the union hiring hall.

Hall assigned him to work at the Naval Air Station in New Brunswick on another remodeling job. The Claimant was installing vinyl siding on base housing. TR 42-43. The Claimant testified that as long as he was able to operate the metal break standing in an upright position he could perform the work. However, when he was required to work off staging or ladders or engage in excessive bending and pulling his back pain increased. *Id.* The Claimant consulted his physician Dr. Bajpai and other specialists who recommended that the Claimant cease doing this type of work as it would exacerbate his back condition. The Claimant had an MRI revealing a herniated disc pressing on a nerve root. The Claimant stopped working on June 23, 2002 on his doctors' recommendation.

In March 2003 the Claimant returned to work as a self-employed carpenter performing residential construction work at his parish church an average of 23 hours per week through the beginning of August 2003. CX 9. The Claimant testified that at the time of the hearing on September 18, 2003, he was working approximately 30 hours a week at the church and he has continued in this employment. TR 52-55. He testified that he is unable to perform heavy carpentry work required in industrial construction. TR 57, 59-60, 76-77. In addition, he explained that he managed to return to self-employment in residential construction work on a less than full-time basis as he is permitted to establish and vary his work hours based upon his physical condition. TR 52-54, 57, 81-83. The Claimant presented evidence showing that he is unable to perform the duties required in his usual work at Atkinson Construction or the duties of a carpenter in industrial construction. As rebuttal evidence, the Employer submits surveillance evidence showing the Claimant mowing his lawn using a riding lawnmower and repairing the lawnmower in June 2003. The Claimant has not asserted that he is unable to perform any activity. Rather he has testified that prolonged bending below the waist, picking materials up from ground level, and prolonged standing results in pain and discomfort. I find that the surveillance evidence is not sufficient to rebut the Claimant's credible statements as to his physical limitations. Accordingly, I conclude that the Claimant can not return to his past work in heavy carpentry in industrial construction.

Once a Claimant seeking total disability has established an inability to return to his usual employment, the burden shifts to the Employer to show suitable alternate employment taking into consideration the Claimant's age, education, work experience and physical restrictions. *American Stevedores, Inc. v. Salzano*, 538 F.2d 933 (2nd Cir. 1976). The Employer has not presented any evidence of suitable alternate employment for the periods of time during which the Claimant was not working and for which the Claimant is seeking temporary total disability compensation benefits. Thus, the Employer has failed to demonstrate that suitable alternate employment was available to the Claimant for the periods of time after September 12, 2001, in which he was not working. Accordingly, I find that the Claimant is entitled to temporary total disability compensation benefits for those periods.<sup>5</sup>

The Claimant is also entitled to temporary partial disability benefits for those periods of time after September 12, 2001, during which the Claimant was working at reduced wages. The Claimant submitted wage records from March 2003 through September 5, 2003 reflecting his actual wages from self-employment as a carpenter in residential construction. CX 9, 12. These

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<sup>5</sup> No evidence was offered as to the exact dates during which the Claimant was not employed. This information will be necessary for the District Director to calculate the Claimant's benefit.

are the only post-injury wage records submitted and are an accurate reflection of the Claimant's current wage-earning capacity. The Employer did not present evidence to show that the Claimant had a higher earning capacity than that reflected by the Claimant's wage records. Therefore, I find that the Claimant is entitled to temporary partial disability benefits representing two-thirds of the difference between the Claimant's average weekly wages before the injury and his wage-earning capacity after the injury.

#### E. Entitlement to Medical Care

Based on my findings that the Claimant's back condition is causally related to his employment with Atkinson Construction he is entitled to reasonable and necessary medical care pursuant to Section 7 of the Act. 33 U.S.C. § 907; *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 222 (1988). A Claimant establishes a prima facie case for compensable medical treatment where a qualified physician indicates that treatment was necessary for a work-related condition. Drs. Mason, Bajpai, Omsberg and Hall all treated the Claimant for his back condition and their reports indicate that the back condition was related to his longshore work. The Claimant continues to treat with Dr. Hall. On these facts, I find that the Claimant has established that he is entitled to medical care. Accordingly, I will order the Respondents to provide medical care pursuant to section 7.

The Claimant also seeks reimbursement for past medical bills and travel expenses related to medical treatment in the amount of \$1601.49. The Claimant submitted a record of medical expenses associated with the Claimant's back injury. CX 10 at 68-75. The Claimant represented that some of the charges for medical treatment were paid and others were not. It is unclear exactly which expenses were paid by the Employer and which were not paid. As the medical expenses relate to treatment for the claimant's back injury, the Employer is responsible for payment and the Claimant is entitled to reimbursement for any of the medical expenses he actually paid. In addition, the Claimant is entitled to reimbursement for his travel expenses associated with medical treatment for his back condition.

#### F. Compensation Due and Interest

Based on the foregoing findings, the Claimant is owed temporary total disability compensation pursuant to Section 8(b) of the Act for the periods subsequent to September 12, 2001 when he had no earnings and temporary partial disability compensation pursuant to Section 8(e) of the Act for those periods subsequent to September 12, 2001 in which he was working but earning reduced wages. Since the Claimant's compensation payments are overdue, interest shall be added to all unpaid amounts. The appropriate interest rate is the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982) which is periodically changed to reflect the yield on United States Treasury Bills. *Grant v. Portland Stevedoring Company*, 16 BRBS 267, 270 (1984) *modified on reconsideration*, 17 BRBS 20 (1985). My order incorporates 28 U.S.C. §1961 (1982) by reference and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.



#### G. Attorney Fees

Having successfully established his right to compensation and medical benefits, the Claimant is entitled to an award of attorneys' fees under section 28(a) of the Act. *American Stevedores v. Salzano*, 538 F.2d 933, 937 (2nd Cir. 1976); *Ingalls Shipbuilding v Director, OWCP*, 920 F.2d 163, 166 (5th Cir. 1993). The Claimant's attorney has filed an itemized application for attorney's fees and costs in the amount of \$5498.95. CX 13. No objection to the fee application has been filed by any party. Upon review, I find that the fee application complies with the requirements of 20 C.F.R. §702.132(a) and that the fees and costs requested are reasonably commensurate with the necessary work done, taking into account the quality of representation, the complexity of the legal issues involved and the amount of benefits awarded. Therefore, I will order the Employer to pay the Claimant's attorney an attorney's fee in the amount of \$5498.95

#### IV. ORDER

Based on the foregoing findings of fact and conclusions of law and upon the entire record, the following order is entered:

1. The Employer, Atkinson Construction Company, and its Insurance Carrier, Travelers Insurance Company, shall pay the Claimant, Thomas E. Bates, temporary total disability compensation pursuant to 33 U.S.C. §908(b), for the periods of time after September 12, 2001 during which the Claimant was not employed at a rate 66 2/3 per cent of his average weekly wage.
2. The Employer and its Carrier shall pay to the Claimant temporary partial disability benefits pursuant to 33 U.S.C. §908(e), for the periods after September 12, 2001 during which the Claimant was employed and earning lower wages than those he earned at Atkinson Construction, at a rate of two-thirds the difference between his average weekly wages before the injury and his wage-earning capacity after the injury for a period not to exceed five years.
3. The Employer and its Carrier shall furnish the Claimant with such reasonable, appropriate, and necessary medical care and treatment as the Claimant's work-related back condition may require pursuant to 33 U.S.C. §907. In addition, the Employer and its Carrier shall reimburse the Claimant for \$1601.49 in medical and associated travel expenses for treatment of the back condition.
4. The Employer and Carrier shall pay the Claimant interest on all past due compensation benefits at the applicable Treasury Bill rate pursuant to 28 U.S.C. 1961 (1982), computed from the date each payment was originally due until paid, and the appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

5. The Employer and its Carrier shall pay to the Claimant's attorney, James Case, attorney fees in the amount of \$5498.95.
6. All computations of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED

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COLLEEN A. GERAGHTY  
Administrative Law Judge

Boston, Massachusetts